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No. 71-1081

In the

Supreme Court of the United States

OCTOBER TERM, 1971

KEARNEY & TRECKER CORPORATION,

Petitioner,

vs.

GIDDINGS & LEWIS, INC.,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1081

KEARNEY & TRECKER CORPORATION,

Petitioner,

vs.

GIDDINGS & LEWIS, INC.,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Giddings & Lewis, Inc., opposes the Petition for Writ of Certiorari filed herein by Petitioner, Kearney & Trecker Corporation for the reasons set forth hereinbelow.

OPINIONS BELOW

The Petition for Writ of Certiorari correctly sets forth the relevant proceedings and opinions below, except insofar as it fails to point out that the Court of Appeals reversed the judgment and remanded the case to the district court to conduct such additional proceedings on the counterclaim as it deems appropriate in the light of the opinion.

JURISDICTION

The Petition correctly states that the jurisdiction of this Court is invoked under Title 28 United States Code, §1254(1).

QUESTIONS PRESENTED

Petitioner presents three questions which it asks this court to answer in the negative. The questions are more theoretical than real because the requested answers would not dispose of the issues in this case.

The first two questions are substantive and incorrectly assume (1) that the original patent had not been surrendered for the broadened reissue patent, and (2) that the patent right had not been abused by the Petitioner's wrongful procurement of the broadened reissues and improper enforcement activities. The third question is procedural and assumes the reviewing court has no right to consider the cumulative effect of corroborative documents improperly excluded by the trial court which corroborate but are not essential to the reviewing court's decision, the latter being predicated on other undisputed documentary, oral, and stipulated evidence admitted by the trial court on issues tried below.

The real question is whether this Court finds it important to review the determination of the Circuit Court of Appeals that (a) the unique pattern of improper conduct of which Petitioner was found guilty by both the trial court and the Court of Appeals results in Petitioner's patent being unenforceable, and (b) Petitioner's attempt to enforce that patent monopoly knowing it to have been tainted by that pattern of conduct exposes it to liability under Sec. 2 of the Sherman Act if the trial court finds respondent to have been injured thereby.

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations are involved in addition to those cited by the Petitioner:

35 U.S.C. §251. **Reissue of defective patents.**

Whenever any patent is, through error without any deceptive intention, deemed wholly or partly inoperative or invalid, by reason of a defective specification or drawing, or by reason of the patentee claiming more or less than he had a right to claim in the patent, the Commissioner shall, on the surrender of such patent and the payment of the fee required by law, reissue the patent for the invention disclosed in the original patent, and in accordance with a new and amended application, for the unexpired part of the term of the original patent. No new matter shall be introduced into the application for reissue.

The Commissioner may issue several reissued patents for distinct and separate parts of the thing patented, upon demand of the applicant, and upon payment of the required fee for a reissue for each of such reissued patents.

The provision of this title relating to applications for patent shall be applicable to applications for reissue of a patent, except that application for reissue may be made and sworn to by the assignee of the entire interest if the application does not seek to enlarge the scope of the claims of the original patent.

No reissued patent shall be granted enlarging the scope of the claims of the original patent unless applied for within two years from the grant of the original patent.

35 U.S.C. §253. **Disclaimer.**

Whenever, without any deceptive intention, a claim of a patent is invalid the remaining claims shall not thereby be rendered invalid. A patentee, whether of the whole or any sectional interest therein, may,

on payment of the fee required by law, make disclaimer of any complete claim, stating therein the extent of his interest in such patent. Such disclaimer shall be in writing and recorded in the Patent Office; and it shall thereafter be considered as part of the original patent to the extent of the interest possessed by the disclaimant and by those claiming under him.

In like manner any patentee or applicant may disclaim or dedicate to the public the entire term, or any terminal part of the term, of the patent granted or to be granted.

37 C.F.R. §1.2 (Patent Office Rule 2). **Business to be transacted in writing.**

All business with the Patent Office should be transacted in writing. The personal attendance of applicants or their attorneys or agents at the Patent Office is unnecessary. The action of the Patent Office will be based exclusively on the written record in the Office. No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt.

37 C.F.R. §1.133 (Patent Office Rule 133). **Interviews.**

(a) Interviews with examiners concerning applications and other matters pending before the Office must be had in the examiners' rooms at such times, within office hours, as the respective examiners may designate. Interviews will not be permitted at any other time or place without the authority of the Commissioner. Interviews for the discussion of the patentability of pending applications will not be had before the first official action thereon. Interviews should be arranged for in advance.

(b) In every instance where reconsideration is requested in view of an interview with an examiner, a complete written statement of the reasons presented at the interview as warranting favorable action must be filed by the applicant. An interview does not re-

move the necessity for response to Office actions as specified in rules 111, 135.

37 C.F.R. §1.176 (Patent Office Rule 176). **Examination of Reissue.**

An original claim, if re-presented in the reissue application, is subject to reexamination, and the entire application will be examined in the same manner as original applications, subject to the rules relating thereto, excepting that division will not be required. Applications for reissue will be acted on by the examiner in advance of other applications.

37 C.F.R. §1.341(g) (Patent Office Rule 341). **Registration of Attorneys and Agents.**

* * *

(g) *Former examiners.* No person who has served in the examining corps of the Patent Office will be registered after termination of his services; nor, if registered before such service, be reinstated, unless he undertakes (1) not to prosecute or aid in any manner in the prosecution of any application pending in any examining division in which he served, on the date he left said division; and (2) not to prepare or prosecute nor to assist in any manner in the preparation of prosecution of any application of another filed within two years after the date he left such division, and assigned to such division, without the specific authorization of the Commissioner. Associated and related classes in other divisions may be required to be included in the undertaking or designated classes may be excluded. In case application for registration or reinstatement is made after resignation from the Office, the applicant will not be registered, or reinstated, if he has prepared or prosecuted, or assisted in the preparation or prosecution of any such application as indicated in this paragraph.

STATEMENT OF THE CASE

No brief statement of the facts of this case does it justice, and the Petitioner's statement omits many of the facts which the Court of Appeals relied upon in ruling as it did. No inference that all the relevant facts before the court are presented in the Petitioner's statement of the case, or are limited to the words of the extensive pretrial fact stipulations (which were largely in the nature of admissions by the Petitioner) is justified.

Since the Court of Appeals did not find it useful or necessary to reach the contested infringement issues and the validity issues under 35 U.S.C. § 103, the fact that it did not disturb the district court findings is not an affirmation of them. The observation (App. 32a-33a) that "the resemblance between the machines supports the district court's finding of infringement of claims 19 and 20" does not reflect a legal test for infringement of the claims, nor did the Court of Appeals consider the validity of any claim so expanded in scope as to satisfy a "resemblance between the machines" infringement test.

The inaccuracy of Petitioner's reference to the lapse of "more than two years after commencement of the original actions" before the Respondent pleaded the anti-trust counterclaim and the amended defenses is not important, although, in fact, appreciably less than two years elapsed between initiation of the litigation on December 21, 1966, and the September 5, 1968 filing of the amended answer and counterclaim setting forth particulars of Petitioner's use of Beall. Much more importantly, six years elapsed after the Petitioner hired Beall before this fact emerged during Respondent's deposition of Petitioner's patent attorneys in the summer of 1968. It was more than two years after the litigation had commenced,

and only after Respondent had deposed former Primary Examiner Beall, by the time Petitioner permitted its trial attorneys to notify the Patent Office in January, 1969 (Stipulated Fact 121 I, R. 125-126) of some of the facts concerning Beall's participation on its behalf in the prosecution of eleven patent applications which had been in his division when he was its chief. Respondent's followup discovery concerning the use of Beall proceeded against resistance by the Petitioner on the grounds of attorney-client privilege and work product maintained until shortly before trial time, after the trial court's order of April 17, 1968 affirmed its earlier order that Petitioner produce the documents named in the Respondent's September, 1968 motion for production. On the eve of trial, which began May 19, 1969, the Petitioner first acknowledged that it would change its licensing practices and drop its attempts to enforce the patent claims added by the reissues.

As noted by the Court of Appeals, this dramatic narrowing of the traditional issues of validity and infringement was the consequence of revelations during pretrial discovery, but it did not occur until almost two and one-half years after the litigation had begun.

At trial Petitioner again objected to admission of documentary reports and advices to it from Mr. Beall on the grounds of attorney-client privilege. (R. 473, 574, 601-9)

GROUNDS FOR DENYING WRIT OF CERTIORARI

1. Petitioner Has Made No Showing of Any Special or Important Reason Why Review on Writ of Certiorari Should be Granted in This Case.

A reading of the unique set of circumstances upon which the Court of Appeals based its determinations makes it apparent that the real question presented by the Petition has extremely narrow application which can only be applied to a situation where:

(1) The patent in suit was originally granted only after extensive amendments of the claims and many off-the-record personal interviews with the subsequently hired Primary Examiner and his assistant Examiner, including some in which the domination of the application by the IBM patent to Morgan and a possible interference with it was discussed; (App. 35a and 37a-40a; Stipulated Facts 121 B through G and Stipulated Fact 122, R. 121-126)

(2) The scope of the originally granted patent monopoly was enlarged by two broadening reissues with the behind-the-scenes assistance of the attorney who, shortly before retirement and employment, was the same Primary Examiner in the Patent Office in charge of and directly involved in passing upon the original patent application; (App. 37a-40a and 45a and Stipulated Fact 121, R. 121)

(3) The retired Patent Examiner was employed while the original application was still pending and his services utilized at the specific direction of Petitioner's principal managing officer and principal patent attorney; (App. 57a-58a and Stipulated Facts 117-119; 121A-G)

(4) The patent in-suit was one of a group of related patents dominating an important line of commerce as to which the former Examiner's assistance was invoked and which had been before him while he was Primary Examiner; (App. 60a-61a and Stipulated Fact 121 I, R. 125-126)

(5) The employment of the former Examiner was kept under cover by the patentee from competitors having patent applications under examination by the same Patent Office examining group or in interference with some of the related applications; (App. 26a; DTX 140 and 146)

(6) The former assistant Examiner who succeeded the retired Primary Examiner in responsibility for the examination of the reissue applications, including the examination of those claims corresponding to the original claims, was influenced by the example of his former chief's employment by the patentee and expressed hopes for his own post-retirement employment by the patentee; (App. 38a-39a and Stipulated Fact 123, R. 127)

(7) The former subordinate Examiner was in fact improperly contacted by his former chief about the progress of the reissue examination and was showered with personal attentions by the patentee; (App. 38a-39a and Stipulated Fact 125, R. 127)

(8) The patentee resisted and thus delayed discovery by the defendant of the full history of the original and reissue patent prosecution; (App. 26a and 41a-42a and R. 41-64; 71-78; 78-82)

(9) The patentee waited until the eve of trial before dropping its charge of infringement of claims added by reissue after forcing the defendant to extend its expenses and spread its energies to prepare infringement defenses

on the broadened added claims; (App. 44a and Stipulated Fact 105, R. 116)

(10) The Petitioner occupied a dominant position in the relevant market, which position was augmented by the prosecution and enforcement of said twice-broadened reissue patent; (App. 60a-61a and Stipulated Facts 67 and 69, R. 104-105)

(11) The Petitioner purchased from IBM the basic patent in the relevant market under which the Respondent was licensed and reissued the same with the advice and assistance of the same retired patent Examiner for the declared purpose of further dominating the line of commerce by making anyone in the industry desiring to compete in that market come to the Petitioner as the owner of both patents. (App. 40a-43a and 61a and DTX 179; R. 819-20)

The foregoing is but a partial statement of the facts which moved the Seventh Circuit Court of Appeals to conclude the patent was unenforceable and to further conclude the Petitioner had both the intention and the potential of monopolizing the relevant market and would be liable for damages for violation of Section 2 of the Sherman Act if the trial court upon remand should find the Respondent to have been injured by such predatory conduct. Petitioner's abuse of the patent privilege by conduct which shockingly violates the most elemental precepts of conflict of interest in an effort to broaden and extend the granted patent monopoly is an abuse far more serious than other abuses or misuses which have been held to deprive the wrongdoer of protection under the patent statutes and to expose him to liability for violation of the antitrust laws.

Any public interest and general importance justifying this Court's review is absent unless two assumptions are made. First, that there is widespread conduct in utilizing the services of an attorney who, as a United States patent Examiner having acted as a guardian of the public interest in passing a patent application to issue, within a short time thereafter advises and assists in securing broader reissues of the same patent. Second, that persons engaging in such conflicts of interest or tempting public employees to do so deserve assurance that they will be deprived only of advantages proven to have come to them as a direct consequence of such conduct without jeopardy to their right to fully assert the patent privilege.

We respectfully submit the first assumption, fortunately, is not a true reflection of the ethical standards of former Patent Office employees or their employers. As to the second, there is no need whatever for comforting anyone who might engage in conduct which undermines public confidence in the integrity of the patent process itself. This Court has never suggested that any abuse by litigants of the judicial process, or of the patent granting process, can be tolerated, much less rewarded.

2. There Is No Conflict to be Resolved.

In applying the rule of *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965) to the facts of this case, the Court of Appeals for the Seventh Circuit is not in conflict with courts of appeal which have declined to apply the *Walker* rule to other cases. There is no conflict whatever. There are only different cases. The Petitioner apparently concedes that the *Walker* case is good law.

The principle of the *Walker* opinion is that the conscious enforcement of a patent monopoly known by the patentee

to be illegal or defective becomes an illegal monopoly under Sec. 2 of the Sherman Act when used to monopolize a relevant line of commerce. That principle was followed by the Court of Appeals in this case. *Walker* makes it clear that the patentee's lack of *bona fides*, rather than statutory patent invalidity, is the material consideration. The Petitioner would have it the other way around.

In *Walker* the patentee, Food Machinery, had maintained suit on the patent until defendant brought to light that plaintiff had concealed evidence of its loss of right to a patent under 35 U.S.C. § 102(b) by reason of public use and sale of the subsequently patented invention more than a year before filing a patent application. Whether the invention was otherwise patentable was immaterial. Whether the Patent Office would have issued the patent any earlier if the application had been filed within the year was immaterial. Whether Food Machinery dropped the infringement action after the fraud was exposed was immaterial. What was material was Food Machinery's conscious assertion of a patent with a known infirmity. Petitioner's conduct in this case, involving conscious assertion of a reissue patent procured by tampering with the patent granting process, is certainly no less material than that of Food Machinery in *Walker*.

Petitioner has ignored both the facts and the law in arguing that there was no causal connection between its conduct and the patent which it improperly obtained. The patent and the wrongful conduct which accompanied its procurement are inseparable. Fine distinctions urged to separate a claim from its patent or an act from its consequences are not relevant in the face of wrongful conduct which threatens the integrity of the judicial or patent granting process upon which the public must rely. *Hazel Atlas Co.*

v. *Hartford Empire Co.*, 322 U.S. 238 (1944); *Keystone Driller Co.* v. *General Excavator Co.*, 290 U.S. 240 (1933).

"Materiality" has no useful application in measuring such a basic abuse as the conflict of interest here involved but that does not make the conflict "immaterial." The Petitioner here would endorse what the Court in *Walker* sought to end — the kind of self-justification which makes fraud and innocence equal legal quantities. Certainly there is no occasion to argue a technical meaning of the word "fraud" as if it were a term of art in the patent statutes (where it does not appear at all). The Court of Appeals decision gave ample consideration to any distinctions as to the types of fraud reached by the Supreme Court in *Walker* and concluded:

> "We think the phrase 'fraud or inequitable conduct' encompasses the kind of conduct disclosed by this record. A violation of the proscriptions against conflict of interest to obtain a broadening reissue involves the same threat to public interest as actual fraud practiced on the Patent Office. *Cf., United States* v. *Mississippi Valley Co.*, 364 U.S. 520" (App. 53a)

3. No New Question of Federal Law Is Involved in the Application of Existing Law to the Facts of This Case.

In part 2 of its brief, the Petitioner argues that points of first impression are raised by the decision below. We submit that such novelty as may exist resides only in the specific facts of the case. Moreover, if others are contemplating indulgence of the type of conduct here condemned by the Court of Appeals, denial of the Petition will better serve the public interest than granting it.

Primarily, the Petitioner charges the Court of Appeals with error in not limiting the application of *Walker* to

concealment of a statutory invalidity defense. This is no more than a wishful argument that willful abuse of the patenting process through a concealed and serious conflict of interest in procuring a broadening reissue of the patent is necessarily a lesser, more "technical" offense to public policy than the willful filing of a patent application more than the statutory year after allowing the public to gain knowledge of the invention. The Petitioner's distinctions are contrary to the public interest served by *Walker* and assume a predisposition to deal generously with litigants who compromise or subvert the machinery of justice, including the process of the Patent Office.

Petitioner, unlike the patentee in *Walker*, continued its attempt to enforce its patent monopoly after the fraudulent conduct was called to its attention. In this respect, it stands in a worse light, not a better light, than the patentee in *Walker*.

The Petitioner did not effectively remove its disqualification under 35 U.S.C. § 288 to maintain an action against the Respondent. While it argues that no determination of invalidity was previously made; the significant point is that the reissue statute (35 U.S.C. § 251) and the disclaimer statute (35 U.S.C. § 253) were not available to it. The benefits of these statutes are by their terms available only to those who are "without any deceptive intention." Moreover, the Petitioner did not risk submitting the twice reissued patent to the jurisdiction of the Patent Office either to make a disclaimer of any or all improperly procured claims or to reissue the patent without them. The patentee who conceals the evidence of the infirmity and avoids the legal remedies of proper reissue or disclaimer is in no position to argue that it is "without deceptive intention" under 35 U.S.C. § 288.

It is not a matter of first impression that a claim brought forward from the original patent does not survive the reissue patent in which the attempt to obtain the added claims is tainted with fraud. *Staude* v. *Bendix Products Corp.*, 26 F.Supp. 901 (N.D. Ind. 1939), *aff'd on other grounds*, 110 F.2d 484 (7th Cir. 1940). Further, it is not a matter of first impression that a patent is void in its entirety because of deceptive intent in not disclosing a claim with an infirmity. *Strong* v. *General Electric Co.*, 305 F.Supp. 1084, 1088 (N.D. Ga. 1969), *aff'd per curiam*, 434 F.2d 1042 (#2) (5th Cir. 1970), *cert. den.* 403 U.S. 906 (1971), and *Intermountain Research & Engineering Co., Inc.* v. *Hercules, Inc.*, ... F.Supp. ....., 171 USPQ 577, 631 (C.D. Cal. 1971). In the final analysis, the extent of inequitable conduct condemned as "unconscionable" or "fraudulent" is to be distinguished from "merely" inequitable conduct on the facts, just as violations of major felony statutes are distinguished by their facts from technical infractions of misdemeanor statutes. Whether the patent is effectively invalidated by unenforceability for its full term or whether it is temporarily unenforceable subject to purging of the effects of the conduct offending public policy depends upon the gravity of the facts. If a grave abuse occurred in the very procurement of the patent, as was the case here, there is no possible basis for subsequent purge, and an exercise in semantics by which such a patent is indicated as unenforceable but emphasized as not invalid only fosters its effectiveness as a scarecrow in the relevant market which the patent owner has attempted to monopolize.

Petitioner's argument that a most important consequence in declaring a patent invalid as well as unenforceable "is that the patent owner can do absolutely nothing

to rehabilitate his patent" (Petitioner's Brief, p. 17), is a reminder that such a deterrent is necessary if the public is to be spared "rehabilitation" by an unrepentant transgressor. Purge without pain by relinquishing at the eleventh hour the broader claims added by reissue did not so rehabilitate the patent as to permit the patentee to gain its end of monopolizing the relevant market by a broad construction of the narrower claims in the same patent. The wrongs are not only that the petitioner forced the respondent before the time of trial to expend its energies and efforts to defend on the broader claims and forced other parties to take licenses under them, but that it had ever attempted to procure the reissue patent in clear violation of basic conflict of interest principles as well as criminal statutes, and that it ever attempted to enforce a patent it had so procured.

Section 2 of the Petitioner's brief concludes with its absurdly strained reading of 18 U.S.C. § 207(a) under which the former government officer would not be in violation of the statute if his actions as an agent or attorney for his new employer "aid or assist" that employer. The Court of Appeals' analysis (App. 46a-48a) needs no amplification. Even the trial court found that Beall acted as Petitioner's agent or attorney, but viewed the offense as merely one of unlicensed practice by Beall (Patent Office Rule 341(g)). The Petitioner itself resisted the production of Beall's reports to it on the ground of attorney-client privilege. Petitioner's argument that the Court of Appeals' ruling on the sorry state of ethics reflected by the facts "also places former governmental employees at a serious disadvantage in securing post-governmental employment" is unjust to former government employees and their employers.

4. It is Within the Province of a Reviewing Court to Consider Documentary Evidence and Dispose of an Appeal on the Merits.

Petitioner does not assert that the Court of Appeals erred in overruling the trial court's exclusion of certain documents. Instead, it bases its objections upon the Court of Appeals' consideration of such documentary evidence, after overruling the trial court in its determination of the cause.*

The question presented by Petitioner merely states the alternatives. Since the approach taken by the Court of Appeals is an available and proper one under the facts presented, review is unnecessary.

It is established law that material evidence consisting mainly of documents and uncontroverted oral testimony may be considered independently by the reviewing court; see for example, *B. F. Goodrich Co.* v. *Rubber Latex Products, Inc.*, 400 F.2d 401 (6th Cir. 1968); *Hart* v. *Gallis*, 275 F.2d 297 (7th Cir. 1960); *Fargo Glass & Paint Co.* v. *Globe American Corp.*, 201 F.2d 534 (7th Cir. 1953).

The erroneously excluded documents in the trial court comprise only a part of the record upon which the reviewing court reached its conclusion that Petitioner had violated the anti-trust laws, an issue before the trial court. In the cases cited by Petitioner there was either no presentation of the issue below, or the court did not rule on

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* The pertinent statute 28 U.S.C. §2106 provides that "the Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

the issue due to its ruling on the evidence that was subsequently overturned in the appellate court. Under those circumstances, the cause was remanded to the trial court to give the opposite party an opportunity to present a defense. No such circumstances exisit here.

In *Collins* v. *Hoffman*, 62 Wash. 278 (1911), relied upon by Petitioner, the document excluded on the basis of a claim of privilege was the only evidence the plaintiff had to establish its fraud allegations and no testimony was permitted on the subject in the trial court. The court of appeals on a later appeal, in *Collins* v. *Hoffman*, 74 Wash. 264 (1913), held that the documentary evidence which was in the record of the earlier appeal merely as identifications was *prima facie* establishment of the sufficiency of the evidence to support a judgment for the appellant. In the present case the documents excluded were cumulative and corroborative of other admitted evidence on the issues decided. Considering this with the aforementioned documentary rule of courts on review, any further review is neither necessary nor proper.

Contrary to any assertion by Petitioner that the Court of Appeals relied only on the excluded documents to make critical findings in support of the conclusions that plaintiff violated the anti-trust laws, it is noted that the reviewing court stated:

> "Since we find the same objection to the procurement of a patent by violation of conflict of interest principles as by fraud, under our appraisal of the exclusionary power of the Brainard reissue claims, that holding persuades us that plaintiff has violated Section 2 of the Sherman Act.
>
> This conclusion is consistent with other evidence in the record upon which defendant places great stress.

> Thus, the provisions in plaintiff's licenses prohibiting separate manufacture or sale of the patented automatic tool changer and requiring licensees to pay royalties on an entire machine tool even though the patented unit represented only about 10% of its cost are probative of an intent to exclude competition and to enhance prices. . . . The basic factors on which we do rely do not involve the resolution of any disputed questions of fact. We have not distributed [sic] any of the findings made by the district court and we have no doubt that if he had considered the reasoning of *Walker* applicable to plaintiff's employment of Beall, as we have held, he would also have found a violation of the Sherman Act." (App. 62a)

There is no question that courts of appeal have the right to interpret for themselves documentary and testimonial evidence and are equally as competent as the trial court to do so. See *Deep Welding, Inc.* v. *Sciaky Bros., Inc.*, 417 F.2d 1227 (7th Cir. 1969) and the cases cited therein.

Finally, the decision of the Court of Appeals not only reversed the judgment of the trial court but remanded the case to the district court "to conduct such additional proceedings on the counterclaim as it deems appropriate in the light of this opinion." Petitioner has not been deprived of its day in court.

CONCLUSION

For the reasons presented above, the Petition for a Writ of Certiorari should be denied.

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